Peter v Republic (Criminal Revision E206 of 2024)
[2025] KEHC 13872 (KLR) (6 October 2025) (Ruling)

Neutral citation: [2025] KEHC 13872 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E206 OF 2024

DKN MAGARE, J

OCTOBER 6, 2025

BETWEEN

MARTIN MURIMI PETER ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged with the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code. After full hearing the Applicant was convicted of the offence of stealing. The court called for the pre-sentence report and subsequently sentenced the applicant to three years imprisonment. This is the maximum sentence for the offence of stealing. There was no appeal from the conviction and sentence. After reflecting, the applicant filed an application for sentencing informally.

2. The applicant had been arrested on 6.10.2023 and convicted on 6.05.2024. There was a first count that was dismissed. It is not subject to this ruling.

3. In the pre-sentence report, the appellant was indicated to have had another case, that is E718 of 2023. However, the prosecution indicated that the applicant was a first offender. He mitigated that the court considered the time spent in custody. The court sentenced the applicant without proceedings relating to the applicant being a first offender. At no time was prosecution invited to change its stand that the applicant was a first offender.

Analysis

4. The law under which the applicant was charge is set out in Section 275 of the Penal Code as follows:

   General punishment for theft - Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

5. Section 362 of the Criminal Procedure Code, which enables this court to resentence, reads as follows;

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

6. The orders which this court can give under Section 362 of the Criminal Procedure Code are spelt out under Section 364 of the Criminal Procedure Code in the following manner;

"

"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under Section 203 or 296 (2) of the Penal Code, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the Prevention of Organized Crimes Act, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

7. It thus behoves this court to examine the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the subordinate court in line with Section 362 of the Criminal Procedure Code and if necessary, issue orders under Section 364.

8. The proceedings concerning the establishment of a previous record are clearly circumscribed in law. The process is neither a matter of conjecture nor an exercise in speculation; it is a structured procedure that requires the participation of both the court and the parties. Section 142 of the Criminal Procedure Code provides for this process as follows:

(1) In any trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force-

(a) by an extract certified, under the hand of the officer having the custody of the records of the court in which the conviction was had, to be a copy of the sentence or order; or

(b) by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in either case, evidence as to the identity of the accused person with the person so convicted.

(2) A certificate in the form prescribed by the Cabinet Secretary given under the hand of an officer appointed by the Cabinet Secretary in that behalf, who has compared the finger prints of an accused person with the finger prints of a person previously convicted, shall be prima facie evidence of all facts therein set out if it is produced by the person who took the finger prints of the accused.

(3) A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person so convicted, together with evidence that the finger prints of the person so convicted are those of the accused person.

(4) A certificate under this section shall be prima facie evidence of all facts stated therein without proof that the officer purporting to sign it did in fact sign it and was empowered so to do.

9. A previous record cannot, therefore, be founded merely on the contents of a probation officer's report. In the case of Stephen Mangera Marwa v Republic [2014] KEHC 1675 (KLR), D.S. Majanja J, discussed the question of previous record as follows:

> The learned magistrate fell into error by accepting the prosecutor's submissions which were not supported by any record of previous convictions. The statements of the prosecutor were prejudicial to the appellant. Previous convictions must be proved by production of a court record and in that respect I adopt the sentiments of Lesiit J., in Abdi Ahmed v Republic Meru HCCA No. 87 of 2010 (Unreported) where she stated;
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> With due respect to the learned magistrate the way to receive a previous record of an accused person was not followed. In such a case the prosecution is required to adduce proof of previous conviction by producing a certificate from the Central Bureau of Criminal Records as proof of the conviction. In the bare minimum the prosecution could provide the case

> umber and the court in which the accused person was convicted and if possible cause it to be availed to the court. In either case the court is expected to put the record to the accused person and require him to admit or deny the same. In the instant case neither a certificate of previous records nor a conviction nor the court and criminal case number in which the Appellant was convicted were given. The prosecution did not therefore establish that the Appellant was ever convicted of any offence prior to the one on record."

10. The right to be heard generally and in particular on the question of a previous record is sacrosanct. In the case of Grace Waithera Kamau v Republic [2005] KEHC 2751 (KLR), Lesiit, J, as then she was posited as follows in regard to the right to be heard on allegations that there was a previous record. She stated as follows:

> Finally, the learned trial magistrate adopted the Probation Officer's report on the Appellants previous record without giving the Appellant an opportunity to be heard. The Appellant had a right to be heard on that allegation particularly due to the fact that the alleged record was not in court.

11. To be fair to the learned magistrate, she did not say that she considered that the appellant had a previous record. However, she gave a maximum sentence, that is usually reserved for cases where there was maximum harm and maximum culpability. The prosecution counsel in this application referred to the said record in this application. My take is that the question of first offender was left in a state of suspended animation and cannot in any way be used against the applicant. He was not heard nor was there a certificate of previous conviction. Indeed it was maintained by the prosecution, on record that this was a first offender. The court will proceed and treat him as such.

12. There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed. In line with this, there must exist a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle was emphasized in the case of R v. Scott [2005] NSWCCA 152, where Justices Howie, Grove and Barr underscored that sentencing must balance the gravity of the offence with the culpability of the offender. The court noted that disproportionate sentencing undermines public confidence in the criminal justice system and may result in an injustice to the offender. It stated:

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender."

13. On the other hand, in the New Zealand decision of R v. AEM [2000] NZCA, the court emphasized that sentencing must not only reflect the seriousness of the offence, but also ensure fairness to the offender in light of all relevant circumstances. The Court of Appeal observed that a mechanistic or overly punitive approach to sentencing risks undermining the rehabilitative and restorative aims of criminal justice, especially where the offender has demonstrated remorse or has already spent a substantial period in pre-trial custody. The decision reaffirmed that proportionality, individualization,

and the principle of totality are essential in crafting just and effective sentences. The court stated as follows:

> " ... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."

14. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

15. The court considered the time from the date of plea. That is not the law. It is from the time of arrest. That is to say, the court had to consider the time in custody under Section 333 (2) of the Criminal Procedure Code. The court is mandated to consider the period the accused spent in remand custody to constitute part of the sentence. In the persuasive authority of Fatuma Hassan Salo vs Republic (2006), Makhandia J asserted that:

> " Sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors."

16. The court has also noted the various trainings the applicant has undertaken while in prison. Lest no one get tempted to say that crime pays, the incarceration appears excruciating. It is not to be taken lightly.

17. In the present case, the value of the goods stolen was a modest sum of Kshs. 15,000/=. While the offence of stealing is not to be treated lightly, the value of the subject matter remains a relevant consideration in assessing the proportionality of the sentence imposed. The loss occasioned to the complainant was of minimal impact.

18. The Applicant was a first offender, yet his mitigation, though brief, was not taken into account. In the circumstances, a proper and just sentence would reasonably have ranged between twelve and eighteen months' imprisonment. The Applicant has already served 24 months in custody.

19. The application dated 12.7.2024 is accordingly allowed.

Determination

20. Based on the above findings, I make the following orders:

    a. The application dated 12.7.2024 is allowed.

    b. I set aside the sentence of 3 years imposed on the applicant and substitute it with a sentence of the period served.

    c. The applicant shall therefore be released forthwith unless otherwise lawfully held.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF OCTOBER, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kimani for the State

Applicant present

Court Assistant – Michael